

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DOUGLAS N. ADDINGTON and RAINY
DAY ADDINGTON,

v.

Plaintiffs,

BANK OF AMERICA, N.A., et al.,

Defendants.

Case No. 3:12-cv-00548-MMD-WGC

ORDER

(Defs.' Motion to Dismiss – dkt. no. 5)

I. SUMMARY

Before the Court is Defendants Bank of America, N.A. ("BANA"), ReconTrust Company, N.A. ("ReconTrust") and The Bank of New York Mellon Corporation's ("BNY") Motion to Dismiss. (Dkt. no. 5.) The Court held a hearing on the Motion on July 25, 2013. For the reasons set forth below, the Motion is granted in part and denied in part.

II. BACKGROUND

A. Factual Background

On August 5, 2005, Douglas N. Addington and Rainey Day Addington ("Plaintiffs") purchased the property located at 1741 Toltec Circle, Henderson, Nevada ("the Property"). The Promissory Note was executed in the sum of \$311,100.00. (Dkt. no. 1-1 at 5.) Plaintiffs state that they made all required payments on the Property through May 1, 2009, when their financial situation changed and Plaintiffs were not able to make their June 1, 2009, payment. (*Id.*) Plaintiffs were served with their first Notice of Default in December 2009 (*id.*), which had been recorded on December 7, 2009 (*id.* at 6).

In response to Plaintiffs' default, the parties attended mediation on June 14, 2010, pursuant to Nevada's Foreclosure Mediation Program, which resulted in an agreement. Plaintiffs allege that the agreement consisted of four terms. They state that Defendants agreed to: (1) prepare and deliver to Plaintiffs a Notice to Vacate the Premises; (2) give Plaintiffs 45 days after the receipt of the Notice and their execution of a Deed in Lieu of Foreclosure to move out of their home; (3) pay Plaintiffs \$1,500 through the "Cash for Keys" program that would result in the full and complete satisfaction of Plaintiffs' obligations under the Promissory Note; and (4) record the loan obligation owed to BNY and BANA as fully paid. (Dkt. no. 7 at 7.) Although the terms are not listed in the Mediation Agreement, which is a one-page form that explicitly states that it is not a formal contract (dkt. no. 1-1, Exh. 1), Plaintiffs allege they were agreed to orally. The mediator, Barbara Dunn, prepared and submitted her Mediator's Statement (a two-page form) to the Mediation Administrator on June 18, 2010. (*Id.*) The Mediator's Statement indicates that, "The parties resolved this matter. No further action is required." (*Id.*)

Despite the mediation agreement, on September 17, 2011, Plaintiffs received a second Notice of Default, dated September 2, 2011. Defendants foreclosed on the Property during a foreclosure sale on February 15, 2012, allegedly in breach of the mediation agreement.

B. Procedural History

Plaintiffs commenced an action in the Second Judicial District Court of the State of Nevada against BANA, ReconTrust, and BNY and Defendants timely removed the action. (Dkt. no. 1-1.) Plaintiffs bring three causes of action: (1) breach of contract; (2) fraud; and (3) bad faith denial of contract existence. (Dkt. no. 1-1.) All three claims are based on Defendants' actions during and following the mediation. Defendants seek dismissal based on lack of subject matter jurisdiction and based on the merits.

III. LEGAL STANDARD

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide

1 “a short and plain statement of the claim showing that the pleader is entitled to relief.”
 2 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While
 3 Rule 8 does not require detailed factual allegations, it demands more than “labels and
 4 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v.*
 5 *Iqbal*, 556 US 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).
 6 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
 7 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient
 8 factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at
 9 678 (internal citation omitted).

10 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
 11 apply when considering motions to dismiss. First, a district court must accept as true all
 12 well-pled factual allegations in the complaint; however, legal conclusions are not entitled
 13 to the assumption of truth. *Id.* at 679. Mere recitals of the elements of a cause of action,
 14 supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a district
 15 court must consider whether the factual allegations in the complaint allege a plausible
 16 claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
 17 alleges facts that allow a court to draw a reasonable inference that the defendant is
 18 liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the
 19 court to infer more than the mere possibility of misconduct, the complaint has “alleged –
 20 but not shown – that the pleader is entitled to relief.” *Id.* at 679 (internal quotation marks
 21 omitted). When the claims in a complaint have not crossed the line from conceivable to
 22 plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

23 A complaint must contain either direct or inferential allegations concerning “all the
 24 material elements necessary to sustain recovery under *some* viable legal theory.”
 25 *Twombly*, 550 U.S. at 562 (*quoting Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,
 26 1106 (7th Cir. 1989) (emphasis in original)).

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1 **IV. DISCUSSION**

2 **A. Jurisdiction**

3 Defendants first argue that this Court lacks jurisdiction to hear the case because
4 Plaintiffs failed to file a timely petition for judicial review following the alleged breach of
5 the mediation agreement. It is undisputed that the Mediator's Statement was issued in
6 June 2010, but this action was not commenced until September 2012.

7 Nevada allows borrowers the option to enter into the Nevada Foreclosure
8 Mediation Program in order to avoid foreclosure. NRS § 107.086. Once a notice of
9 default is issued, a trustee must send a form providing the borrower with the option of
10 mediation. NRS § 107.082(2)(a). The Nevada Supreme Court has issued rules that
11 govern foreclosure mediation, the Foreclosure Mediation Rules, pursuant to the
12 legislature's directive. NRS § 107.086(8). While the rules have been modified since, the
13 2009 Foreclosure Mediation Rules ("the 2009 FMR") govern this dispute.

14 The 2009 FMR provide limited mechanisms by which parties may seek judicial
15 review of the mediation. Rule 21 states that:

16 A party to the mediation may file a petition for judicial review with the
17 district court in the county where the notice of default was properly
18 recorded. A hearing shall be held, to the extent that the court deems
19 necessary, for the limited purposes of determining bad faith, enforcing
20 agreements made between the parties within the Program, including
21 temporary agreements, and determining appropriate sanctions pursuant to
22 NRS Chapter 107 as amended.

23 The time period for seeking relief is also extremely restricted. Rule 21 requires that a
24 petition for judicial review must be filed within 30 days of the date that the petitioning
25 party received the Mediator's Statement.¹

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27 ¹The 2013 FMR version of Rule 21 provides for the 30 day period to be triggered
28 from either the date that the party received the notification of the issuance or non-
 issuance of a certificate or, if a temporary agreement is reached and either party fails to
 fulfill the obligations, the expiration date of the temporary modification agreement or date
 of the breach.

1 This Court holds that a petition for judicial review, as defined by the 2009 FMR, is
2 not the exclusive remedy available to parties seeking to enforce an agreement reached
3 during mediation. First, the plain language of the Rules does not support a reading that
4 such a petition is the exclusive remedy available to redress a breached mediation
5 agreement. Rule 21 states that “[a] party to the mediation *may* file a petition for judicial
6 review with the district court in the county where the notice of default was properly
7 recorded.” (emphasis added.) The unpublished Nevada Supreme Court decision that
8 Defendants cite in support of their argument that a petition for judicial review under Rule
9 21 is Plaintiffs’ sole remedy, *Surgeoner-Jernigan v. Cititmortgage*, 2012 WL 5857293 at
10 *1 (Nov. 16, 2012 Nev.), is distinguishable on a number of grounds. *Surgeoner-Jernigan*
11 addressed the question of whether the conduct at a previous mediation could be
12 considered in the petition for review arising from a second mediation. In this case, the
13 Court is deciding whether a court can consider claims that could not have been raised in
14 a petition for review under the 2009 Foreclosure Mediation Rules.

15 Second, a contrary holding would create an unusually unfair result and undermine
16 the lofty purposes of the Foreclosure Mediation Program. While Rule 21 facially allows
17 parties to pursue judicial review to enforce an agreement, it provides no remedy if a
18 party breaches the agreement more than 30 days after receiving the Mediator’s
19 Statement. If a petition for judicial review were the only remedy for a breach of a
20 mediation agreement, not only would many harmed parties be left without a remedy, but
21 the mediation program itself would be severely undermined. An offending lender could
22 simply wait 30 days after reaching a mediation settlement to violate the agreement, thus
23 escaping accountability for its breach. Perhaps recognizing this unfair result, the revised
24 rules, effective January 1, 2013, added, among other changes, a provision allowing
25 parties to file a petition for judicial review within 30 days of the alleged breach of the
26 agreement, even if the breach occurred more than 30 days after receiving the Mediator’s
27 Statement.

28 The Court thus denies dismissal based on subject matter jurisdiction.

1 **B. Failure to State a Claim**

2 The Court next addresses Defendants' other ground for seeking dismissal on the
3 merits.

4 **1. Breach of Contract**

5 Plaintiffs allege in their Complaint that during the mediation the parties entered
6 into a settlement agreement, which Defendant subsequently breached. Defendants
7 contend that no enforcement agreement existed to support Plaintiffs' claim.

8 "A plaintiff in a breach of contract action must show (1) the existence of a valid
9 contract, (2) a breach by the defendant, and (3) damage as a result of the breach."
10 *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1240 (D. Nev. 2008) (citations
11 and quotation marks omitted). Plaintiffs have pled all the essential elements of this
12 claim.

13 First, Plaintiffs allege that the parties entered into a settlement agreement at the
14 mediation. The fact that the one-page Mediation Agreement states, as Defendants point
15 out, that it is not a formal contract does not preclude the parties from having entered an
16 enforceable oral agreement during mediation. Second, Plaintiffs allege that Defendants
17 breached this agreement when they issued the second Notice of Default/Election to Sell
18 under Deed of Trust, dated September 2, 2011. (Dkt. no. 1-1 at 9.) That Plaintiffs viewed
19 the Notice of Default as a breach is evidenced by the fact that "[u]pon receiving this
20 Notice, plaintiff Rainey Day Addington wrote to defendant ReconTrust, apprising it that
21 plaintiffs had already entered into a settlement agreement concerning the Promissory
22 Note which plaintiffs had owed to defendant BNY Mellon." Plaintiff Rainey Day
23 Addington sent the letter to ReconTrust on September 19, 2011, and also sent a copy to
24 the Foreclosure Mediation Program Administrator. (*Id.* at 10.) Plaintiffs allege that
25 Defendants further breached by failing to: (1) pay the \$1,500 amount they had agreed
26 upon; (2) prepare a deed in lieu of foreclosure; (3) accept a deed in lieu of foreclosure;
27 and (4) record the Promissory Note as being fully paid. (*Id.* at 7–8.) Finally, Plaintiffs
28 describe the damage caused by the breach, particularly the damage to their credit

1 history and inability to secure another loan as a result. (Dkt. no. 1-1 at 12–13.) Plaintiffs
2 have therefore alleged all three essential elements of a breach of contract claim.

3 Defendants argue, however, that even if the Court finds that Plaintiffs have
4 sufficiently pled a breach of contract claim, the Statute of Frauds bars the contract's
5 enforcement. The Nevada Statute of Frauds states that:

6 No estate or interest in lands, other than for leases for a term not
7 exceeding 1 year, nor any trust or power over or concerning lands, or in
8 any manner relating thereto, shall be created, granted, assigned,
9 surrendered or declared after December 2, 1861, unless by act or
operation of law, or by deed or conveyance, in writing, subscribed by the
party creating, granting, assigning, surrendering or declaring the same, or
by the party's lawful agent thereunto authorized in writing.

10 NRS 111.205(1). However, the Statute of Frauds is not a bar to proceeding at this
11 stage.

12 First, Defendants improperly raised their Statute of Frauds defense for the first
13 time in their Reply. See *United States v. Gianelli*, 543 F.3d 1178, 1184 n.6 (9th Cir.
14 2008) (“[A]rguments raised for the first time in a reply brief are generally considered
15 waived.”). Defendants contend that this argument was in response to Plaintiffs’ assertion
16 in their opposition brief that the alleged agreement was oral. (See dkt. no. 12 at 4 n.3.)
17 While Plaintiffs did not explicitly state in their Complaint that the contract at issue is oral,
18 Plaintiffs did allege very specific contractual terms, and it is clear that the one-page
19 Mediation Agreement did not enumerate these terms. It therefore is unreasonable for
20 Defendants to assume that Plaintiffs were alleging the contract was written and
inexcusable that Defendants failed to raise their Statute of Frauds claim until their Reply.

22 Even if the Court considers Defendants’ Statute of Frauds argument, the alleged
contract at issue here may fall within the Statute’s exceptions. There is a long-
23 recognized exception to the Statute of Frauds for parties who have demonstrated partial
24 performance. See *Whitney v. Hay*, 181 U.S. 77 (1901) (“[P]art performance removes the
25 bar of the statute, on the ground that it is a fraud for the vendor to insist on the absence
26 of a written instrument, when he had permitted the contract to be partly executed.”)
27 (citations and quotation marks omitted). Plaintiffs claimed at oral argument that they
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1 vacated the Property a few days after the mediation in fulfillment of their contractual
2 requirements. While Defendants asserted that Plaintiffs had already intended to move,
3 this is a factual dispute not properly resolved on a motion to dismiss.

4 **2. Fraud**

5 Plaintiffs' fraud claim must be pled with particularity. "Under Rule 9(b), claims
6 alleging fraud are subject to a heightened pleading requirement, which requires that a
7 party state with particularity the circumstances constituting fraud." *In re VeriFone*
8 *Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 701 (9th Cir. 2012) (quoting Fed. R. Civ. P.
9 9(b)). "Rule 9(b) demands that the circumstances constituting the alleged fraud be
10 specific enough to give defendants notice of the particular misconduct so that they can
11 defend against the charge and not just deny that they have done anything wrong."
12 *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558 (9th Cir. 2010) (citations omitted).
13 Accordingly, "the complaint would need to state the time, place, and specific content of
14 the false representations as well as the identities of the parties to the misrepresentation."
15 *Id.* (citations omitted).

16 The elements of fraud are "(1) [a] false representation made by the defendant;
17 (2) defendant's knowledge or belief that its representation was false or that defendant
18 has an insufficient basis of information for making the representation; (3) [that] defendant
19 intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and
20 (4) damage to the plaintiff as a result of relying on the misrepresentation." *Barmettler v.*
21 *Reno Air, Inc.*, 956 P.2d 1382, 1386 (Nev. 1998).

22 The Complaint does not allege fraud with sufficient particularity. Plaintiffs have
23 alleged no facts suggesting that Defendants knew at the time of the agreement that they
24 would fail to fulfill their obligations. Their statements in the Complaint regarding
25 telephone conversations between Rainey Day Addington and representatives of BANA
26 in which the representatives indicated no knowledge of the mediation agreement (dkt no.
27 1-1 at 10–13) is not specific evidence that Defendants knew its representations in the
28 mediation were false. Plaintiffs' fraud claim is therefore dismissed.

1 **C. Bad Faith Denial of Contract Existence**

2 Plaintiffs' third claim for relief is not sufficiently plead. They assert in their
3 Complaint that "Defendants' denial of the existence of a settlement and contract was to
4 avoid all liability on plaintiffs' meritorious contact claim and was a stonewall position
5 adopted without probable cause and with no belief in the nonexistence of the settlement
6 and contract as a defense . . ." (Dkt. no. 1-1 at 14.) Plaintiffs have failed to state a valid
7 claim for relief under Nevada law or plead adequate supporting facts. In their opposition
8 brief, Plaintiffs attempt to repackage this allegation as a tort claim for violation of the
9 implied covenant of good faith and fair dealing. (Dkt. no. 7 at 10.) This latter claim was
10 not sufficiently pled in the Complaint, nor supported by evidence. Plaintiffs' third claim is
11 dismissed.

12 **V. CONCLUSION**

13 The Court notes that the parties made several arguments and cited to several
14 cases not discussed above. The Court has reviewed these arguments and cases and
15 determines that they do not warrant discussion as they do not affect the outcome of the
16 Motion.

17 IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss (dkt. no. 5) is
18 GRANTED in part and DENIED in part. Dismissal of Plaintiffs' second and third claims is
19 without prejudice.

20 DATED THIS 6th day of August 2013.

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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE